



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2004

Ms. Leah Curtis Morris
Curtis, Alexander, McCampbell & Morris
P. O. Box 1256
Greenville, Texas 75403-1256

OR2004-4680

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203134.

The Hunt Memorial Hospital District (the "district"), which you represent, received a request for a specified "current banking bid contract and pricing sheets." You claim that the submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. You state that the submitted information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the district notified the interested third party, Bank One, N.A. ("Bank One"), of the district's receipt of the request and of Bank One's right to submit arguments to us as to why any portion of the submitted information should not be released. *See* Gov't Code §552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have considered the exception you claim and have reviewed the submitted information.

We note at the outset that the district only submitted to us bid proposal information that has been submitted to the district by Bank One. We, therefore, presume that the district has already provided the requestor with any other information that may be responsive to the request to the extent that it existed on the date of the district's receipt of this request. If not, then the district must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Bank One has not submitted comments to us explaining why any portion of the submitted information should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate Bank One's proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the district may not withhold any portion of the submitted information on the basis of any proprietary interest that Bank One may have in the information.

We now address the district's section 552.104 claim. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.* However, this office has determined that in some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

In this instance, you state that the district is "in the process of bidding for a new bank bid pursuant to [the district's] authorizing statute." You also state that the "provision of the copy of the contract in question would give a competitor an advantage in the bid process and would detrimentally affect the present provider's ability to bid for provision of the service." After carefully reviewing your arguments and the submitted information, we find that the district has failed to adequately demonstrate in this instance that the release of the submitted information would harm the competitive interests of the district for purposes of section 552.104 with regard to the current banking bid process. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interests in competitive bidding situation). Accordingly, we conclude that the district may not withhold any portion of the submitted information under section 552.104 of the Government Code.

Finally, we note that portions of the submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of

records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No.550 (1990).

In summary, the district must release the entirety of the submitted information to the requestor. However, in doing so, the district must comply with the applicable copyright law for the portions of the submitted information that are copyrighted.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 203134

Enc. Submitted documents

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